8-13-2014

Brief for Appellants. Alabama Legislative Black Caucus v. Alabama, 135 S.Ct. 1257 (2015) (No. 13-895), 2014 WL 4059779

Eric Schnapper
University of Washington School of Law, schnapp@uw.edu

James U. Blacksher

Edward Still

U.W. Clemon

No. 13-895

In The Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

v.

ALABAMA, *et al.*,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

BRIEF FOR APPELLANTS

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

JAMES U. BLACKSHER
P.O. Box 636
Birmingham, AL 35201
(205) 591-7238
jblacksher@ns.sympatico.ca

EDWARD STILL
130 Wildwood Parkway
Suite 108 PMB 304
Birmingham, AL 35209
(205) 320-2882

U.W. CLEMON
WHITE ARNOLD & DOWD P.C.
2021 Third Avenue North
Suite 500
Birmingham, AL 35203
(205) 323-1888

Counsel for Appellants

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTION PRESENTED

Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.

PARTIES

The plaintiffs in this action are the Alabama Legislative Black Caucus, the Alabama Association of Black County Officials, Bobby Singleton, Fred Armstead, George Bowman, Rhondel Rhone, Albert F. Turner, Jr., and Jiles Williams, Jr. The defendants are the State of Alabama and Jim Bennett, Alabama Secretary of State. The intervenor-defendants are state Senator Gerald Dial and state Representative Jim McClendon.

In *Alabama Democratic Conference v. State of Alabama*, No. 13-1138, the plaintiffs are the Alabama Democratic Conference, Demetrius Newton (deceased), Framon Weaver, Sr., Stacey Stallworth, Rosa Toussaint, and Lynn Pettway. The defendants are the State of Alabama, Robert J. Bentley, Governor of Alabama, and Jim Bennett, Alabama Secretary of State. The intervenor-defendants are state Senator Gerald Dial and state Representative Jim McClendon.

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OPINIONS BELOW

The December 20, 2013 opinion of the district court, which is reported at 989 F.Supp.2d 1227 (M.D. Ala. 2013), is set out at J.S.App. 1-275. The August 2, 2013 opinion of the district court, which is reported at 988 F.Supp.2d 1285 (M.D. Ala. 2013), is set out at J.S.App. 278-407. The April 5, 2013, opinion of the district court, which is unofficially reported at 2013 WL 1397139 (M.D. Ala. April 5, 2013), reconsideration denied 988 F.Supp.2d 1285 (M.D. Ala. 2013), is set out at J.S.App. 408-36. The December 26, 2012, opinion of the district court, which is unofficially reported at 2012 WL 6706665 (M.D. Ala. Dec. 26, 2012), is set out at J.S.App. 437-53.

JURISDICTION

The final judgment denying all claims in these consolidated actions was entered on December 20, 2013. J.S.App. 276-77. The Alabama Legislative Black Caucus plaintiffs filed their notice of appeal on January 6, 2014. J.S.App. 454-57. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. This Court noted probable jurisdiction on June 2, 2014.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The statutes and constitutional provision involved are set out in an appendix to the brief.

STATEMENT

For much of the twentieth century there were no blacks in the Alabama Legislature. The first black members of the Alabama House in the modern era were elected in 1970, and the first black Senators in 1974. The number and boundaries of majority-black legislative districts have been a matter of controversy in Alabama throughout the ensuing decades.

Following the 1990 census, the Legislature failed to redistrict itself; new districts were ordered into effect by an Alabama court in 1993. *See Brooks v. Hobbie,* 631 So.2d 883, 884 (Ala. 1993). Under the 1993 court-ordered plan, there were 27 majority-black House districts ("HD") and 8 majority-black Senate districts ("SD"). Most of those districts had a total black population between 60% and 70% black. J.S.App. 47. The lowest black population was in HD 85, which was 51.13% black. In elections under the 1993 plan, black candidates were successful in all of these majority-black districts, including HD 85. Since 1993, candidates supported by black voters have been elected in all majority-black districts in Alabama. Most but not all of those successful candidates have been black; there are currently two white members of

the Alabama Legislature elected in majority-black districts.

The 2000 census revealed that the majority-black districts were all underpopulated.[1] Population shifts had reduced the total population in many of those districts,[2] and others had not grown as fast as the rest of the state. The Alabama Legislature, at that time controlled by Democrats, adopted a redistricting plan. Under that plan the black population percentage was reduced in all of the majority-black Senate districts, and in 22 of the 27 majority-black House districts.[3] The 2001 plan reduced the average black population percentage[4] by 6.19% in the majority-black Senate districts and 5.05% in the majority-black House districts.[5] The largest reductions were in HD 57 (reduced by 19.648%) and HD 82 (reduced by 16.163%). HD 85 was reduced from 53.3% to 47.9% and SD 28 was reduced from 59.269% to 56.458%. The 2001 plan also created a new majority-black district, HD 84, which was only 52.4% black. J.S.App. 21-23. The black members of the legislature supported the plan, even though it substantially reduced the size of

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[1] State Defendants' Exhibit ("SDX") 407, 441.

[2] *Compare* SDX 407 and 411 *with* SDX 402 and 406.

[3] SDX 407, 411; Brief Appendix, pp. 8a-10a.

[4] We refer to the amount of change in the percentage of the black population by calculating the difference between the percentages under two plans, rather than by calculating the ratio, in percent, between the two percentages.

[5] *See* Brief Appendix pp. 8a-10a.

the black majorities in the all the Senate districts and almost all of the House districts. The state submitted these changes to the Department of Justice for pre-clearance under section 5 of the Voting Rights Act. The Department did not object to these reductions in the size of the black majorities in any of the affected districts. *See Montiel v. Davis,* 215 F.Supp.2d 1279, 1289 (S.D. Ala. 2002) (three-judge court) (Black, J., concurring).

Black candidates continued to be elected from HD 85 under the 2001 plan, even though now it was only a black-plurality district.[6] Candidates supported by black voters were also elected from HD 84 and SD 28, even though in both the black population was less than 60%, and actually declined over the next ten years.[7] During the decade following enactment of the 2001 plan, the black population fell below 60% in five other House districts,[8] and in a Senate district.[9] Candidates supported by the black voters nonetheless continued to win the elections in those districts. In HD 73, originally majority-white, the black population grew substantially; by 2010 HD 73 was a plurality-black district, with a population 48.55% black. APX 6;

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[6] Doc. 125-4, Alabama Legislative Black Caucus Exhibit ("APX") 67, McClendon dep., 121.

[7] By the 2010 census, HD 84 was only 50.67% black and SD 28 was only 51.05% black. APX 6; APX 7; J.A. 103-08.

[8] APX 6; J.A. 103-08 (House districts 32 (59.62%), 53 (55.71%), 54 (56.77%), 82 (57.18%) and 83 (57.03%)).

[9] APX 7; J.A. 107-08 (Senate district 18 (59.93%)).

J.A. 105. In 2010 the candidate supported by black voters in HD 73 defeated the incumbent in the general election.[10]

The 2010 census[11] revealed that the majority-black districts were all underpopulated. This was due to a decline in the population in some districts, and slow growth of the population in others.[12] The majority-black Senate districts on average were underpopulated by about 15%, and the average majority-black House district was underpopulated by about 16%. J.S.App. 47-48.[13] The minimum number of additional people who would have to be added to each district turned in part on how much the Legislature decided to permit a district to depart from the ideal size. In

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[10] Newton Plaintiffs' (Alabama Democratic Conference) Exhibit ("NPX") 324 at 25; Tr. v. 3, at 39.

[11] There is a minor difference in the manner in which the Department of Justice and certain Alabama calculations in this case determined from the 2010 census whether to treat an individual as black, due to several subcategories in the census data. Those differences are not material to the resolution of this case, but they give rise to some minor discrepancies in the data.

[12] The majority opinion suggests that these districts were underpopulated in 2010 largely if not exclusively because in 2001 the Democratic controlled Legislature had deliberately underpopulated these districts as part of a partisan gerrymander. J.S.App. 4-7, 18-20. Whatever the motives of the 2001 Legislature, its plan clearly was not the primary cause of the underpopulation that existed by the 2010 census. Under the 2001 plan, the average majority-black district was underpopulated by less than 2.5%. *See* J.S.App. 54-56.

[13] The average underpopulation can be calculated from the tables on these pages.

prior redistricting, Alabama had required districts to be within 5% of the size of an ideal district. In designing the post-2010 census districting plan, however, the framers decided instead to permit a deviation of only 1%. That decision significantly increased the number of additional individuals who would have to be added to an underpopulated district. To bring the majority-black districts to within 1% of the ideal size, the new districting plan had to add about 20,000 persons to the average majority-black Senate district and about 6,000 persons to the average majority-black House district. The central controversy in this appeal concerns the method that was used by the Alabama Legislature in selecting the individuals to be moved into the majority-black districts.

In 2012 the Legislature was now controlled by the Republicans, who had supermajorities in both the House and Senate. The framers of the 2012 districting plan chose to deal with the need to repopulate the majority-black districts in a manner very different from that used by the framers of the 2001 plan. In selecting the persons to be added to those majority-black districts, the 2012 plan – through a variety of stratagems described below – ensured that about 64% of those added to the majority-black districts would be black,[14] even though the total Alabama population outside those districts – the pool from which those

[14] *See* nn.16, 17, *infra.*

individuals was drawn – was only about 17% black.[15] In repopulating SD 26, the 2012 plan added 14,806 blacks and 36 whites. Over 121,000 blacks[16] were added to the majority-black House districts, about 20% of all blacks in Alabama who did not already live in a majority-black House district.[17] Over 105,000 blacks[18] were added to the majority-black Senate

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[15] Using the Senate figures described in n.18, *infra,* the 27 Senate districts that were not majority black had a total population of 3,856,004, of which 656,307 were black.

[16] APX 6 contains total and black populations for all the House districts. It sets out the total and black populations of 26 districts with a black voting age population in 2001; these omit HD 84, which only had a black voting age population plurality. When the data for HD 84 are added to the totals for the 2001 plan, those totals then refer to the same 27 majority-black districts in the totals for the 2012 plan. The 2012 plan increased the sum population of those 27 districts by 191,659, of which 121,790 (63.5%) were black. The numbers for both would be slightly higher if HD 85, which went from plurality-black to majority-black, were included.

[17] The 2012 plan added to the 27 majority-black House districts 121,790 of the 594,151 blacks who were not then living in those districts.

[18] APX 7 contains total and black populations for all the Senate districts. It sets out the total and black populations of 7 districts with a black voting age population in 2001; these omit SD 28, which only had a black voting age population plurality. When the data for SD 28 are added to the totals for the 2001 plan, those totals then refer to the same 8 majority-black districts in the totals for the 2012 plan. The 2012 plan increased the sum population of those 8 districts by 165,591, of which 107,298 (65.2%) were black.

districts, about 16% of all blacks who previously had been in other districts.[19] *See* J.S.App. 195-98, 231-32.[20]

In a majority of the new districts, the black population percentage actually went up compared to the population under the 2010 census in the 2001 plan districts. *See* Brief Appendix, pp. 5a-7a, *infra*. HD 59 rose from 67.04% black to 76.8% black. SD 33 increased from 64.89% black to 71.1% black. SD 28 increased from 51.05% black to 59.96% black. J.A. 17. The 2012 plan raised the percentage of the black population in many of the very districts whose black population percentage had been lowered by the 2001 plan.[21]

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[19] The 2012 plan added to the 8 majority-black Senate districts 105,298 blacks out of 656,307 who prior to that plan were not living in majority-black districts.

[20] In this portion of his opinion the dissenting judge describes the number of blacks who would have had to be added to the majority-black House and Senate districts if all of them had been 1% below the size of an ideal House and Senate district. All of those districts were somewhat larger than that.

[21] HD 59, lowered by 3.0% in 2001, was increased by 9.76% in 2012. HD 72, which was decreased by 17.16% in 2001, was increased by 5.02% in 2012. HD 72, which was decreased by 3.91% in 2001, was increased by 4.38% in 2012. HD 76, which was decreased by 4.44% in 2001, was increased by 4.34% in 2012.

Conversely, in 8 of the 11 districts in which blacks had been between 30% and 50% of the population, the plan reduced the black population to below 30%.[22]

House and Senate Districts 30% to 50% Black: Eliminated by the 2012 Plan[23]

District	*2001 Plan*	*2012 Plan*
HD 73	48.55%	10.5%
HD 45	36.01%	15.5%
SD 11	34.24%	15.30%
SD 7	32.49%	27.68%
HD 6	30.75%	16.9%
HD 61	30.58%	19.1%
HD 74	30.55%	24.7%
HD 38	30.24%	16.9%

Every black member of the Alabama Legislature voted against adoption of the 2012 plan.[24] Several had expressed concern at earlier hearings that the Republican majority might fashion a plan that packed blacks into the existing majority-black districts.[25]

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[22] "The district court expressly found that the need to equalize population and maintain the population of adjacent majority-black districts necessarily changed these 'opportunity' districts." Joint Motion to Affirm, No. 13-1138, 14.

[23] APX 6 and APX 7; J.A. 103-08.

[24] NPX 323 (Arrington) at Table 6.

[25] Doc. 30-25 (SDX 441) at 8-9 (Rep. England), Doc. 30-28 (SDX 444) (Sen. Sanders, Rep. Melton), Doc. 30-12 (SDX 433) at

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After a draft of the 2012 plan was made public, individual black Representatives and Senators offered alternative plans that had lower black populations in the districts.[26] Those proposals were all rejected; the framers of the 2012 plan candidly testified that they would not accept these proposals because they did not add enough blacks to the districts in question.[27] *See* J.S.App. 206. The black state Senator from Mobile expressly asked that the population to be added to her district come from white areas, insisting that she could and indeed wanted to represent white voters.[28] Her request, too, was rejected; the 2012 plan instead increased the proportion of blacks in her district.[29]

This action was commenced in 2012 by the Alabama Legislative Black Caucus, the Alabama Association of Black County Officials, one black Senator and five black members of county commissions. A

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6 (Rep. Scott), 8-9 (Rep. Coleman), Doc. 30-30 (SDX 466) at 25-27 (Rep. Coleman).

[26] *See* APX 20-23.

[27] Tr. v. 1, 75, 124, 133; Dial. dep., Doc. 125-3, APX 66, at 38-39.

[28] Tr. v. 2, at 46 ("on the floor of the senate. . . . [a]s we started debating, and I saw the percentages in my district, I asked for more white voters. I said I was very capable of representing white people. And they said that they couldn't go one way or the other. So I said, well, why can't you go . . . over the bay to Baldwin County? But one of the senators from that area didn't want me in their local delegation.").

[29] Senator Figures represents SD 33.

subsequent action was filed on behalf of the Alabama Democratic Conference and other individuals. Both proceedings were brought against the state of Alabama and one or more state officials. Because the complaints challenged the validity of a state districting plan, it was heard by a three-judge court. 28 U.S.C. § 2284. The Republican co-chairs of the Legislature's Redistricting Committee, Senator Gerald Dial and Representative Jim McClendon, intervened as defendants.

The complaints initially asserted two race-related claims. First, they alleged that the 2012 plan was adopted for the intentionally discriminatory purpose of diluting black votes, by packing black voters into the existing majority-black districts, in violation of the Equal Protection Clause of the Fourteenth Amendment. Second, the complaints contended that the 2012 plan had the effect of diluting black votes, in violation of section 2 of the Voting Rights Act. 42 U.S.C. § 1973.

In June of 2013 the plaintiffs took the deposition of Randy Hinaman, the political consultant who, working with Senator Dial and Representative McClendon, had created the disputed 2012 plan. Hinaman candidly explained that the framers of the 2012 plan had expressly sought whenever possible to fix the percentage of the black population in each district at a level no lower than it was in the 2001 districts after the 2010 census. Achieving that result required that the areas added to each district contain at least the same black percentage as the district to

which it was being joined. Hinaman insisted that section 5 of the Voting Rights Act required that the state redistrict in this manner. In the wake of Hinaman's deposition, the plaintiffs expanded their claims to include an argument that the 2012 plan was a racial gerrymander that violated *Shaw v. Reno,* 509 U.S. 630 (1993) (*"Shaw I"*).

Depositions of Dial and McClendon confirmed Hinaman's account of how the 2012 plan had been crafted; Dial and McClendon explained they had repopulated the majority-black districts in this manner because they believed they were required to do so by section 5. These accounts delineated four specific tactics that the framers had used to attempt to assure that each of the majority-black districts would have at least the black population percentage that existed under the 2001 lines after the 2010 census. First, in Montgomery County they dismembered HD 73 – the black plurality district – and used portions of it to add to the neighboring majority-black districts. As Hinaman put it, "District 73 was cannibalized if you will to repopulate [HDs] 77, 78, and 76."[30] *See* pp. 39-40, *infra.* Second, they cannibalized a majority-black district, HD 53, and used various parts of that district to add blacks to the eight remaining majority-black districts in Jefferson County.[31] *See* p. 38, *infra.* Third,

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[30] Doc. 134-4, APX 75, at 142.

[31] To avoid reducing the number of majority-black districts, the 2012 plan created a new majority-black district in Madison

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in deciding which areas to add to each majority-black district, Hinaman selected particular areas, precincts or census blocks so that the resulting district would, if possible, have a black population no lower in percentage than the 2001 district had after the 2010 census. Where necessary to achieve that result, Hinaman had extended districts into other counties and divided precincts on racial lines. *See* pp. 41-49, *infra*. Fourth, in at least one instance Hinaman removed white areas from an underpopulated majority-black district so that they could be replaced by black neighborhoods. *See* pp. 51-53, *infra*.

The case was tried before the three-judge court in August 2013. Regarding the plaintiffs' *Shaw* claims, there were no significant disputes about the manner in which Hinaman, Dial and McClendon had framed the 2012 plan. All three maintained that in light of section 5 they were obligated to replicate in the new districts, where possible, the same black population percentages that existed in the 2001 districts after the 2010 census. They gave similar accounts both of that purpose of the 2012 plan and of the specific race-conscious steps they had taken to assure that result. In the district court, the central issue was whether under this Court's decision in *Shaw* and its progeny those largely undisputed facts required strict scrutiny of the 2012 plan, and if so whether the state's race-conscious action could withstand strict scrutiny

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County, which was then assigned the number, HD 53, of the cannibalized district.

because it was required by section 5. Those remain the controlling legal issues in this Court.

SUMMARY OF ARGUMENT

(1) In 2012 Alabama redistricted its House and Senate in a manner that systematically transferred into the state's majority-black districts a significant portion of the black population which previously had been in majority-white districts. Approximately 122,000 blacks were moved into the existing majority-black House districts, representing about 20% of the state's black population that had been in white districts. Over 108,000 blacks were transferred into existing majority-black Senate districts. The redistricting increased the population of one House District by 14,806 blacks and only 36 whites. All of the black members of the Alabama Legislature voted against the plan.

The facts regarding the motives of the Legislature and the manner in which this large number of blacks was packed into already existing majority-black districts are largely undisputed. The district court erred in concluding that those facts did not constitute a violation of the Equal Protection principles articulated in *Shaw v. Reno* and its progeny.

(2) The central feature of the redistricting plan was the implementation of district-specific racial ratios to determine who would be added to each majority-black district. In the wake of the 2010

census, the majority-black House and Senate districts were all underpopulated, and substantial additional populations had to be added to each of those districts. The state decided that the black proportion of the population added to each majority-black district should equal or exceed the racial composition of the district in question under the 2001 plan after the 2010 census. The racial ratios thus determined varied from about 51% in one district to over 70% in several others.

The district court itself found, and the framers of the 2012 plan acknowledged, that the framers intended to "maintain the same relative percentages of black populations in the majority-black districts." Those state officials insisted they believed that section 5 of the Voting Rights Act required them to match the black population percentage in each majority-black district. The Legislature's written Guidelines directed that compliance with the Voting Rights Act be given "priority" over all traditional districting principles. Thus the achievement of the district-specific racial ratios was by definition the predominant purpose of the plan, the circumstance that establishes a *Shaw* claim.

The district court erred in holding that the predominant purpose of the plan was *instead* compliance with the constitutional requirement of one person, one vote. *Shaw* claims usually arise in the context of districts that are sufficiently similar in size that they present no separate constitutional issue under *Reynolds v. Sims,* 377 U.S. 533 (1964). If deliberate

compliance with one person, one vote could defeat a *Shaw* claim, *Shaw* would be virtually a dead letter. This Court has repeatedly found liability for a *Shaw* violation in cases where none of the districts was unconstitutionally malapportioned.

(3) Alabama implemented the district-specific minimum racial ratios with exactitude. In 13 of the House districts the black population percentage of the new district was within 0.71% of – and always above – the percentage in the old district under the 2010 census. In 7 of those districts the black population percentage was less than 0.1% higher than in the old district. That pattern was "unexplainable on grounds other than race." *Hunt v. Cromartie,* 526 U.S. 541, 546 (1999).

The state subordinated a number of important traditional districting principles to the requirement of achieving the district-specific minimum racial ratios. The Legislature's Guidelines identified keeping incumbents in separate districts, and preserving existing districts, as longstanding state districting principles. But the redistricting plan cannibalized two districts – one majority-black and one plurality-black – for the avowed purpose of distributing their black populations to other districts in order to meet the applicable racial ratios in the surviving districts. Abolition of those districts necessarily meant that their incumbent Representatives were placed in the same districts as other incumbents.

The Guidelines also directed that each House and Senate district should be composed of as few counties as possible. In Alabama redistricting that does not cross county lines is a matter of constitutional importance, because the state Constitution requires apportioning House and Senate seats among whole counties, and because county legislative delegations control all local laws for their respective counties. There was undisputed evidence that the framers of the 2012 plan, in order to achieve the racial ratios, repeatedly crafted districts that crossed county lines.

(4) The district court erred in holding that section 5 of the Voting Rights Act requires a covered jurisdiction to maintain the minority population percentage of every majority-minority district. A reduction in that percentage will not always affect the ability of members of a protected group to elect their preferred candidates of choice. The minority population in a district might be so high that a reduction would have no practical consequences.

The Department of Justice, which administers section 5, has maintained both before and after the 2006 amendments that whether a districting plan is retrogressive depends on a number of circumstances in addition to the change in the minority population percentage.

ARGUMENT

I. ACHIEVING THE DISTRICT-SPECIFIC MINIMUM RACIAL RATIOS WAS THE PREDOMINANT PURPOSE OF THE REDRAWN MAJORITY-BLACK DISTRICT LINES

A. The Governing Legal Standard

In a series of decisions beginning with *Shaw v. Reno*, this Court has recognized an Equal Protection claim where racial considerations were the "predominant" purpose of a district's boundaries or of a districting plan. *Easley v. Cromartie,* 532 U.S. 234, 243 (2001) (controlling issue is whether "race ... *predominantly* explains [the district's] boundaries") (emphasis in original); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) ("in this context, strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision"); *Bush v. Vera*, 517 U.S. 952, 959 (plurality opinion), 996 (Kennedy, J., concurring) ("ample evidence ... demonstrates the predominance of race in Texas' redistricting") (1996); *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 905, 907 (1996); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("[t]he plaintiff's burden is to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"); *Shaw v. Reno, supra.* Proof of such predominance serves two functions which inform the meaning of this element of a *Shaw* claim.

First, proof that race was the predominant purpose of a legislative district is necessary to establish a violation of the Equal Protection right recognized in *Shaw*. This Court has repeatedly explained that a *Shaw* claim requires more than proof that race was *a* consideration behind a redistricting plan. *Easley*, 532 U.S. at 241 (majority opinion), 266 n.8 (Thomas, J., dissenting). "The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Shaw II,* 517 U.S. at 905 (quoting *Miller*, 515 U.S. at 911, 915-16)). A *Shaw* claim is "analytically distinct," for example, from a claim that a districting scheme "has the purpose and effect of diluting racial group's voting strength." *Shaw I*, 509 U.S. at 649, 652.[32] In non-*Shaw* Equal Protection cases, the initial burden on a plaintiff is only to show that race was "a motivating factor," *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 319 U.S. 274, 287 (1977). *Shaw* requires more.

Second, *Shaw* holds that proof of a predominant racial motive establishes a cognizable injury that gives rise to standing. Outside of the context of a dilution claim, demonstrating the existence of individualized harm resulting from a districting plan may be hard, because "it will frequently be difficult to discern why a particular citizen was put in one district or another." *United States v. Hays*, 515 U.S. 737, 744 (1995). A plaintiff could not establish a cognizable

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[32] *E.g., Rogers v. Lodge,* 458 U.S. 613, 616-17 (1982); *White v. Regester,* 412 U.S. 755, 765-666 (1973).

personal injury merely by showing that someone else had been added to (or removed from) his or her district on the basis of race.[33] But a districting plan whose predominant purpose is racial threatens distinct representational harms cognizable under the Fourteenth Amendment. *Hays,* 515 U.S. at 745; *Shaw I*, 509 U.S. at 648, 650.

Miller made clear that *Shaw* claims are not limited to districts which have a bizarre shape. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller,* 515 U.S. at 913. A plaintiff may establish the existence of such a predominant motive with other types of evidence. *Id.*

In the previous *Shaw* cases considered by this Court, there was often a dispute of fact as to whether the legislature at issue had considered race at all in crafting the districts in dispute. This case is different and simpler. The motives of the framers of the 2012 plan were candidly disclosed; the issue here is only

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[33] The deliberate creation of a majority-white or majority-black district would not, without more, bring about the type of cognizable injury recognized in *Shaw*. Absent a *Shaw* claim, a plaintiff challenging such a district would have to show some other type of injury, such as vote dilution.

whether those acknowledged purposes, and the actions to which they led, satisfy the predominance standard.

B. The Avowed Racial Purpose of The 2012 Plan

(1) The district court recognized the racial standard utilized by the Alabama Legislature in determining which persons should be added to the majority-black districts to increase their total population levels to within 1% of the ideal district size. Here, unlike in *Easley*, the state does not contend that the district lines were fashioned for partisan rather than racial reasons. To the contrary, state officials acknowledged, and the district court found, that the areas to be added to each majority-black district were selected to ensure that the black percentage in that district was at least as high as it had been in the 2001 district under the 2010 census. State officials maintained that section 5 of the Voting Rights Act required them to redistrict in that race-conscious manner, and the state's own guidelines mandated that the Voting Rights Act – thus interpreted – be given priority over all traditional districting principles, subject only to the requirement of one person, one vote.

The district court concluded that "[t]he Legislature preserved, where feasible, the existing majority-black districts and *maintained* the relative percentages of black voters in those majority-black districts."

J.S.App. 181-82 (emphasis added). The court pointed out that both Hinaman and Dial had described in that way the standard they used in drafting the plan. J.S.App. 100 (Dial testified that "the Committee tried to match the percentages of the total black population in majority-black districts to the percentages in the 2001 districts based on the 2010 census."), 151 ("Hinaman ... added enough contiguous black populations to maintain the same relative percentages of black populations in the majority-black districts.").

Dial explained that "We wanted to make sure [the majority-black districts] stayed as they were and ... that they grew into the same proportion of minorities that they originally had or as close to it as we could get it."[34] Hinaman agreed that "when it came to the percentages of an individual district, I wanted to get as close as possible or try to be as close as possible

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[34] Dial dep., APX 66, Doc. 125-3, at 17; *see id.* at 100 ("Q. . . . [Y]ou wanted to make sure that the percentage of total population of African-Americans in [the majority-black Senate districts] stayed the same? A. As close to it as possible"); tr. v. 1 at 54 ("Q. And to be clear, the retrogression standard that you applied required . . . that you maintain the black majority percentage, the level, the size of the black majorities, in those districts; is that correct? A. Yes, sir."), 79 ("if they grew in by population, they had to grow in the same percentage that they already have and not regress that district"), 94 ("Q. You've testified about how you were unwilling to lower the minority percentage in any district to avoid your view of what regressing was, retrogressing. A. That's correct."), 133 ("the minority districts . . . had to grow . . . in the same proportion of minorities that they already had.").

to the numbers that existed with the 2010 census put into the 2002 [sic] ma[p]."[35] McClendon explained that "we tried to look at the 2010 census, overlay it on the districts, and try not to change the percentages of the citizens, the black citizens."[36] In its motion to affirm in No. 13-1138, the state stated that "*one* of the Legislature's overall goals was to 'make sure that each black-majority district ... maintained its prior percentage of black population.' J.S. 18." (ADC Joint Motion to Affirm, at 20) (emphasis in original). At trial the state objected that plaintiffs' proposals to create an additional majority-black district would not "maintain prior population portions in minority districts."[37] This Court noted in *Hunt v. Cromartie* that "[o]utright admissions of impermissible racial motivations are infrequent...." 526 U.S. at 553. The state, to be sure, insists these racial motives were permissible; but their existence is uncontroverted.

The state sought to justify this systemic use of race by insisting that it was required by section 5 of

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[35] Hinaman dep., APX 75, Doc. 134-4, at 101; *see id.* tr. v. 3, 118 ("I tried where possible not to lower the total population of African American population in those minority majority districts"), 145 ("And then looking at 2010 census as applied to 2001 lines, whatever that number was. I tried to be as close to that as possible"), 163 ("I tried to draw those districts as close to the numbers as possible").

[36] Tr. v. 3 at 221.

[37] Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 73; *see id.* at 77 (plaintiffs failed to show new minority district could be created "without lowering the minority percentages in surrounding districts").

the Voting Rights Act. The district court stated that Dial, McClendon and Hinaman "understood that, under the Voting Rights Act, the ... new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census." J.S.App. 32-33. "Senator Dial, Representative McClendon, and Hinaman understood 'retrogression' under section 5 of the Voting Rights Act to mean ... a significant reduction in the percentage of blacks in the new [majority-black] districts as compared to the 2001 districts with the 2010 data." J.S.App. 33.[38] That is what Dial said he thought section 5 required the state to do. "Q. ... [W]as it your opinion that reducing the black percentages in the majority-black districts would violate the Voting Rights Act? A. Yes, sir."[39] A decrease of even a single percent in the proportion of the population that was black, Dial insisted, would have been impermissible.[40]

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[38] Dial testified that the Committee understood the Voting Rights Act "to require that it not reduce . . . the approximate levels of black population within [the majority-black] districts." J.S.App. 94.

[39] Dial dep., APX 66 Doc. 125-3, at 39-40.

[40] Dial dep., APX 66, at 81:

> Q. So you did not want the population of African-Americans to drop in [SD 23]?
>
> A. That's correct.
>
> Q. Okay. And if that population dropped a percentage, in our opinion that would have been retrogression?
>
> A. Yes, sir.

> Q. ... [I]f that [black] population dropped a percentage, in your opinion that would have been retrogression?
>
> A. That's correct.
>
> Q. ... [I]f Senator Sanders' district had been 65 percent African-American, and if it dropped to 62 percent African-American in total population, then that would have been retrogression to you?
>
> A. In my opinion, yes.
>
> Q. And so that's what you were trying to prevent?
>
> A. Yes.[41]

In this Court the state insists that "the drafters of Alabama's plans interpreted Section Five to require them to keep the percentages of minority voters roughly constant in the majority-minority districts...." Joint Motion to Affirm, No. 13-1138, at 8. The drafters' insistence that section 5 *required* them to maintain the black population percentage in each of the majority-black districts confirms that state officials used race in precisely that manner.

Under the Legislature's written Guidelines, that mistaken interpretation of section 5 automatically took priority over traditional districting principles.[42]

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[41] *Id.* at 81.

[42] The Department of Justice section 5 guidance makes clear that section 5 does not require a covered jurisdiction to

(Continued on following page)

The Guidelines set out a number of such principles, such as composing districts "of as few counties as practicable," compactness, avoiding contests between incumbents, not dividing precincts, and respecting the integrity of communities of interest.[43] But the Guidelines expressly provided that "priority is to be given to ... the Voting Rights Act...."[44] The district court pointed out that under the state's own standards "the 'first qualification' after meeting the guideline of an overall deviation of 2 percent was not to retrogress minority districts when repopulating them." J.S.App. 149. "The guidelines acknowledged that not all of the redistricting goals could always be accomplished and provided that, in cases of conflict, priority would be given to the requirement of one person, one vote and to the requirements of the Voting Rights Act." J.S.App. 27-28. In this Court the state itself points out that "[t]he district court ... expressly credited the testimony of the plan's drafters that, after one-person one-vote, their next highest goal was to comply with the Voting Rights Act." Joint

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mechanically override in this manner its traditional districting criteria. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act,* 76 Fed.Reg. 7470, 7471-72 (Feb. 9, 2011).

[43] Doc. 30-4, at 3-4.

[44] *Id.* at 4 ("In establishing congressional and legislative districts, the Reapportionment Committee shall give due consideration to all the criteria herein. However, priority is to be given to the compelling state interests requiring equality of population among districts and the Voting Rights Act of 1965, as amended, should the requirements of those criteria conflict with any other criteria.").

Motion to Affirm, No. 13-1138, at 5. In light of the drafters' erroneous insistence that the Voting Rights Act mandated the maintenance of the black population percentages at the same levels that existed in majority-black districts under the 2001 lines after the 2010 census, adding enough blacks to each majority-black district to replicate that black percentage necessarily was in the framers' view a requirement that "could not be compromised." *Shaw II,* 517 U.S. at 907.

(2) The framers of the 2012 plan were committed to achieving the district-specific minimum racial ratios "if possible." But when the additional population available to repopulate an underpopulated district did not have a sufficiently large black population percentage to achieve that ratio, the framers had to use whatever population was available to satisfy one person, one vote.

The district court believed that this meant that one person, one vote – not the racial ratios – was the predominant motive under *Shaw.*

> We agree with our dissenting colleague that all districting principles were subordinated to a single consideration, but our dissenting colleague identifies the wrong one.... [T]he consistent testimony of Senator Dial, Representative McClendon, and Hinaman established that the constitutional requirement of one person, one vote trumped every other districting principle.... While accomplishing this primary task, Hinaman also tried to satisfy sections 2 and 5 of the Voting Rights

> Act. Our dissenting colleague discounts Hinaman's paramount commitment to population equality....

J.S.App. 151-52; *see id.* at 147-48.

But proof of a *Shaw* violation does not require a demonstration that racial purpose would also have predominated over complying with the constitutional limitations on the permissible deviation in district size. *Shaw* does not require a showing that the framers of a districting plan in order to achieve some racial purpose had *also* violated, or at least would have been willing to violate, the constitutional requirement of one person, one vote. *Shaw* claims usually arise in the context of districts that are sufficiently similar in size that they present no separate constitutional issue under *Reynolds v. Sims.* Those who draft districting plans virtually always begin with a commitment to crafting districts sufficiently similar in size to be constitutional. If that near universal priority were sufficient to defeat a *Shaw* claim, *Shaw* would be a dead letter.

This Court found constitutional violations in *Hunt v. Cromartie*, *Bush v. Vera,* and *Shaw v. Hunt.* None of these cases presented proof that the framers of the plan in question had violated one person, one vote, or that they would have done so if necessary to achieve the racial purpose in question. The legislative guidelines adopted by Georgia in *Miller* "required single-member districts of equal population." 515 U.S. at 906. In *Shaw II* the state unsuccessfully argued that race was not the predominant motivating factor

because the framers of the district in question also had "an intention to meet one-person, one-vote requirements."[45] The dissenters in *Easley* did not suggest there was any evidence in that case of a violation of, or willingness to violate, the requirement of one person, one vote. 532 U.S. at 259-66.

The *Shaw* requirement that a racial purpose have predominated over traditional districting principles refers to districting criteria other than a state's effort to comply with the constitutional principle of population equality. *See Miller*, 515 U.S. at 916 ("compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests"); *Bush v. Vera,* 517 U.S. at 962 ("compactness"); *Shaw I*, 509 U.S. at 647 ("compactness, contiguity, and respect for political subdivisions").

C. The Subordination of Traditional Districting Criteria

The drafters' determination to maintain the existing black percentage in all of the majority-black districts meant that they had to achieve a different minimum racial ratio in each district. That district-specific minimum racial ratio varied from 50.61% in HD 84 to several House and Senate districts above 70%.[46] Insuring that as many districts as possible

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[45] State Appellees' Brief, *Shaw v. Hunt*, at 34, available at 1995 WL 632461.

[46] APX 6; J.A. 103-06.

were above these various district-specific racial ratios was of controlling and pervasive importance in the framing of the 2012 plan.

(1) The drafters implemented with painstaking exactitude their determination to repopulate the majority-black districts, where possible, so that the black population percentage did not decrease.

Change in Black Population Percentage 2001 and 2012 Plans Under 2010 Census[47]

District	*2001 Plan*	*2012 Plan*	*Difference*
HD 55	73.55%	73.55%	0
HD 97	60.66%	60.66%	0
HD 56	62.13%	62.14%	+ .01%
HD 67	69.14%	69.15%	+ .01%
HD 52	60.11%	60.13%	+ .02%
HD 57	68.42%	68.47%	+ .05%
HD 69	64.16%	64.21%	+ .05%
HD 54	56.73%	56.83%	+ .10%
HD 53	55.70%	55.83%	+ .13%
HD 70	61.83%	62.03%	+ .20%
HD 60	67.41%	67.88%	+ .47%
HD 83	56.92%	57.52%	+ .60%
HD 32	59.34%	60.05%	+ .71%

[47] These data are set out at pp. 13-14 of the Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196. The percentage for HD 53 under the 2012 plan is in SDX 403, p. 5 col. 7.

In almost half of the majority-black House districts, the black population percentage changed less than .75%; in a quarter of them it changed by less than .1%. In every House district within this .71% range, the black population percentage either went up or stayed the same. There is virtually no change in the percentage in the district denoted House District 53, despite the fact that the original HD 53 in Jefferson County was abolished and replaced by an entirely new district, with the same House District number, but located some 100 miles away in Madison County. The black population percentage also changed by less than 1% in three of the eight majority-black Senate districts.[48]

This pattern is assuredly "unexplainable on grounds other than race." *Hunt v. Cromartie*, 526 U.S. at 546 (quoting *Shaw I*, 509 U.S. at 644). In a single case, or even several instances, the racial composition of a new district might by chance be close to or even the same as that of its predecessor, but surely that could not occur by chance in such a large number of districts in a single redistricting plan. The state has never contended this was simply an extraordinary coincidence. The pattern makes clear that in each of these districts whatever traditional districting factors might otherwise have influenced the selection of areas to be added to a district were set aside in favor of adhering to the applicable district-specific minimum racial ratio.

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[48] SD 23 rose by .08%, SD 24 rose by .44%, and SD 18 fell by .82%. Doc. 196 at 12.

The dissenting judge below correctly remarked upon the "racial exactitude" of the manner in which those ratios were implemented. J.S.App. 230.

> In some districts, the rigidity of these quotas is on full display. HD 52 needed an additional 1,145 black people to meet the quota; the drafters added an additional 1,143. In other words, the drafters came within two individuals of achieving the exact quota they set for the black population; these two people represent .004% of the district. In HD 55, the drafters added 6,994 additional black residents, just 13 individuals more than the quota required, and in HD 56 they added 2,503 residents, just 12 individuals more than the quota required, both out of a total population of 45,071.

J.S.App. 208-09 (footnoted omitted).

In seven House districts[49] and three Senate districts[50] the black population percentage increased more than one percent. That was entirely consistent with the testimony of the drafters that they intended to create black majorities "at least" as great as had

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[49] HD 59 (+9.76%), HD 68 (+2.1%), HD 71 (+2.1%), HD 72 (+4.38%), HD 76 (+4.34%), HD 82 (+5.02%), and HD 84 (+1.73%). Brief Appendix, pp. 5a-6a.

[50] SD 26 (+2.47%), SD 28 (+8.91%), and SD 33 (+6.82%). Brief Appendix, p. 7a.

existed under the 2001 plan after the 2010 census.[51] In at least one of those districts there is evidence that the drafters systematically drew the lines to increase the black population percentage. (*See infra*, pp. 51-52). The district court commented that "the Legislature fairly balanced the *overall* percentages of the black voting-age population in the majority-black House districts" (J.S.App. 182) (emphasis added), so that the districts in which the black percentage increased balanced out the districts in which the Legislature had been unable to achieve the racial ratio. The comment suggests that the majority below believed that the drafters had deliberately added extra blacks to some districts to make up for the fact that it had not been possible to move into other majority-black districts enough blacks to achieve the district-specific minimum racial ratio for those particular districts.

(2) Hinaman, Dial and McClendon all testified that they had maintained the black population percentage whenever possible. Under the state Guidelines, the only criterion that was not subordinate to the Voting Rights Act (as they interpreted it) was the requirement of one person, one vote. Hinaman explained that sometimes when he needed to add population to a majority-black district, the black population percentage of the district unavoidably declined because

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[51] J.S.App. 148 ("I did not consider any [black percentage] too high, based on . . . the fact that the districts had to grow proportionately.") (quoting Senator Dial).

the proportion of blacks in the areas adjacent to that district was too low. "In some districts, it was obviously ... unavoidable because there was just not the African-American population to enter those districts. The black percentage was going to go down no matter what. So there were certain areas where you couldn't help but lower the percentage."[52] The only other explanation Hinaman (or anyone else) gave for lowering the black population percentage was to transfer blacks from HD 19 into the newly created majority-black HD 53.[53] "Hinaman never testified that he lowered the black percentage in any district for any other reason." J.S.App. 229 (dissenting opinion). The court below commented that the fact that the black percentage declined in some majority-black districts "supports the inference that Hinaman subordinated racial considerations to the guideline of an overall deviation in population of 2 percent." J.S.App. 150. That observation necessarily reflects the fact that the reason the district-specific minimum racial ratio was

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[52] Hinaman dep., Doc. 134-4, APX 75, at 102; *see* tr. v. 3, 162-63:

> Q. . . . [Y]ou . . . lowered House District 98 from 65.22 to 65.2. And House District 103 as well, didn't you?
>
> A. Sometimes there's no way to avoid it.

[53] Tr. v. 3, 162

> Q. Well, you lowered House District 19, which was 69.82 percent, to 61.25 percent. Correct?
>
> A. Yes, I did, but for the greater good of creating another African American majority district.

not achieved in some cases was that the available areas that could be used for the necessary repopulation of underpopulated majority-black districts simply did not have a large enough black population.

The district court commented that "[t]he legislature reduced the percentage of black persons in majority-black districts where necessary to achieve other objectives." J.S.App. 144. But the court below did not suggest that the "other objectives" included anything except assuring that the districts were of reasonably equal population, and in one instance creating a new majority-black district.

The district court understood that in framing the 2012 plans the drafters had sought to replicate the black population percentage that existed in the 2001 districts *after the 2010 census*.[54] Dial,[55] McClendon,[56] and Hinaman[57] all explained that benchmark with which they compared the new districts was the black population under the 2010 census in the 2001 districts. Hinaman emphasized that he never even looked at what the black population had been in the 2001 districts under the 2000 census.[58] The state told the district court the same thing, noting that the Department of Justice benchmark – which it was seeking to replicate – was the population under the 2010

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[54] J.S.App. 100, 103.

[55] Tr. v. 1, at 54.

[56] Tr. v. 3, 221.

[57] Tr. v. 3, 118, 142, 145.

[58] Doc. 134-4, APX 75, at 23-24.

census in the old 2001 districts.[59] The state's post-trial brief contained a table which compared the composition of the districts under the 2012 plan with the composition of those districts under the 2001 plan after the 2010 census.[60]

However, in assessing the significance of the 2012 plan, the majority below relied on the wrong table in the state's proposed findings. The table set out at p.47 of the Jurisdictional Statement Appendix lists the population in the 2001 districts at the time of the 2000 census, *not* after the 2010 census.[61] The failure to distinguish between the percentages in those districts under the 2010 census – which the drafters had used as their benchmark – and the different percentages under the 2000 census, led to a series of problems. First, the majority opinion, relying on that table, repeatedly states erroneously that the 2012 plan lowered the black population percentage in 13 House districts and raised it in only 14. J.S.App. 46, 159-60.[62] In fact (compared to the population under the 2010 census) the 2012 plan raised

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[59] Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 11, 37.

[60] *Id.* at 12-14.

[61] The figures for the 2001 districts are in the fourth column from the right.

[62] In another passage the majority compared the black *voting age* population in the 2012 and 2001 districts under the 2010 population. J.S.App. 182. It is undisputed, however, that the district-specific minimum racial ratios were based on total population, not voting age population.

the black population percentage in 20 House districts and lowered it in only 7.[63] Second, apparently also relying on this table, the majority rebukes the dissenting judge for "fail[ing] to mention that there are 5 majority-black House districts below 60 percent under the new plan in contrast with only 2 majority-black House districts below 60 percent under the 2001 plan...." J.S.App. 160. In fact, under the 2001 plan after the 2010 census there were 6 majority-black House districts (not 2) below 60%.[64] The 2012 plan increased the black population percentage in all of them, raising 2 to over 60%, and only created a new fifth "majority-black" district under 60% by also increasing the population in what had been a black plurality district under the 2001 plan.[65] Third, the majority criticized the dissenting judge for ignoring the record of "many ... examples" in which the 2012 plan had reduced the black percentage of majority-black districts. J.S.App. 154. But the court's calculations utilize the data in the table at J.S.App. 47, which is based on the wrong census. In fact, in 5 of the 8 examples which follow this statement the black

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[63] APX 6; J.A. 103-06.

[64] Under the 2010 census HD 32, 53, 54, 82, 83, and 84 were under 60% black. APX 6; J.A. 103-06.

[65] APX 6; J.A. 103-06. The 2012 plan raised to over 60% the black populations in HD 32 and HD 82. HD 85 was changed from a plurality-black district to a majority-black district.

population percentage (as measured after the 2010 census) actually was increased by the 2012 plan.[66]

(3) The Legislature's Guidelines expressly set out as one of the "criteria for ... legislative ... districts" "avoid[ing] when ever [sic] possible" putting two incumbents in the same district.[67] That policy, the Legislature explained was "embedded in the political values, traditions, customs, and usages of the State of Alabama."[68] Protecting the core of each existing district was also an avowed criterion for the redistricting plan, in part because it protected existing communities of interest, another criterion expressly mandated by the Legislature.[69] Both of these traditional districting principles were expressly sacrificed to the Legislature's higher goal of achieving the district-specific minimum racial ratios. As the dissenting judge below pointedly observed, "[i]n [two House districts] the racial quotas trumped the stated goals of both maintaining the core of districts and avoiding conflicts between incumbents." J.S.App. 233.

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[66] The 2012 plan increased the black population percentage in HD 52, 53, 54, 83 and 97 (compared to their populations in the 2001 districts under the 2010 census), all of which the majority described as having reduced black population percentages. J.S.App. 154. The dissenting judge correctly noted that the 2012 plan had increased the black population percentage in those districts. J.S.App. 208 n.16.

[67] Doc. 30-4, at 2-3 (capitalization omitted).

[68] *Id.* at 3.

[69] *Id.* at 3; J.S.App. 147.

The state expressly agreed, and the district court correctly found, that the majority-black HD 53 was cannibalized so that the black population from that district could be divided up among the surviving majority-black House districts in Jefferson County, in order to avoid any reduction in their black population percentage. J.S.App. 38. The dismemberment of HD 53 enabled the state to keep five of those House districts over 65% black, and three of them over 70% black.[70] The incumbent Representative in HD 53, Demetrius Newton, the former Speaker pro tempore and one of the longest serving black members of the Alabama Legislature, was placed in the district of another incumbent. Neither the core nor any other part of HD 53 survived; the district number was assigned to a new district 100 miles away in Madison County.

The state expressly agreed, and the district court correctly found, that HD 73 was also cannibalized for the same reason. (Although the majority below refers to HD 73 as "majority white," it actually had a black plurality when it was cannibalized in 2012; *see* J.S.App. 37 (majority opinion), 200 n.10 (dissenting opinion)). The black population which had once been part of that district was divided up among majority-black House districts in Montgomery County in order to avoid any reduction in their black population percentages. J.S.App. 36-37. The incumbent representative from HD 73 was placed in the district of another

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[70] SDX 403.

incumbent. Neither the core nor any other part of HD 73 survived; that district number was assigned to a new, overwhelmingly white district 75 miles away in Shelby County.

The black populations culled from these two districts were used to try to meet the district-specific minimum racial ratios in 8 Jefferson County majority-black districts and 3 Montgomery County majority-black districts; the cannibalization of HD 53 and HD 73 thus accounts for about 40% of the majority-black districts whose ratios were maintained.

The majority below commented that "Hinaman avoided all incumbency conflicts in the Senate and permitted only two conflicts in the House." J.S.App. 160; *see id.* at 57 ("only" two conflicts between incumbents). But the "only" highlights the significance of the undisputed facts; avoiding conflicts was a fundamental standard for the redistricting, which was never sacrificed except when doing so was necessary to satisfy the district-specific minimum racial ratios. Elsewhere the court explained that "Hinaman avoided, as much as possible, the placement of more than one incumbent in each district ... [a]nd ... to preserve communities of interest, Hinaman preserved, as much as possible, the core of each existing district." J.S.App. 147. But again, the qualification "as much as possible" acknowledges that protecting these traditional districting principles was not "possible" if they conflicted with the district-specific minimum racial ratios. The court dismissed the dismemberment of these two districts on the ground that "neither

of those House conflicts remains because afterward Representative Newton [from HD 53] died and Representative Hubbard [from HD 73] moved his residence." J.S.App. 160. But the drafters' insistence on putting these incumbents in the districts of other representatives is important, not because of the injury to the political careers of Newton and Hubbard, but because it is a glaring example of the subordination of traditional districting principles to the maintenance of the district-specific minimum racial ratios.

(4) Avoiding the division of counties is a districting principle of constitutional significance in Alabama. That principle is embedded in the state Constitution; section 200, for example, provides that "No county shall be divided between two [Senate] districts...." Legislative districting plans have been invalidated for violating these whole-county requirements. *Burton v. Hobbie*, 591 F.Supp. 1029, 1035 (M.D. Ala. 1983) ("we find that Act No. 82-629 is impermissible under Ala.Const. art. IX §§ 198, 199 & 200 because of its disregard for the integrity of county lines. Boundaries of thirty counties were unnecessarily split by the plan."). The Guidelines adopted by the Legislature for the 2012 redistricting provided that "[e]ach House and Senate district should be composed of as few counties as practicable."[71] Those Guidelines also provided that county boundaries by definition delineated a "community of interest" which should be

[71] Doc. 30-4, at 3.

respected.[72] During the public hearings that preceded the adoption of the 2012 plan, the most widely expressed concern of local officials and voters was to maintain county lines and to minimize the number of districts that crossed county lines.[73]

Minimizing the number of districts that cross county lines is uniquely important in Alabama because of its unusual impact on control of individual counties. Alabama does not have the county home rule that prevails in at least most of the country. The Alabama Constitution contains no general grant of authority to county officials; rather, the state Constitution empowers the counties themselves to act only in a number of limited ways. Many of the issues affecting only a specific county are outside the authority of county officials, and must instead be dealt with by the state Legislature.[74] Each year the legislature adopts a large number of measures which affect only a single county, making many of the decisions that almost anywhere else would be handled at the local level.

For decades the Alabama Legislature has fashioned these county-specific measures through an informal local delegation system. As a general matter, the Legislature will approve any county-specific proposal sponsored by the legislative delegation from

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[72] *Id.* at 3-4.

[73] J.S.App. 30-31, 44; NPX 323, par. 117.

[74] J.S.App. 341-42, 428-29.

that particular county. Depending on the size of a county's delegation, agreement on such measures may by tradition require approval of a majority of the delegation, or in some instances unanimity. J.S.App. 342-46 (dissenting opinion). For all practical purposes, the legislative delegation for a particular county wields most of the powers that in at least most states would be held by a county council or commission.

Under the local delegation custom, the delegation which controls legislation for a particular county is composed of every member of the House or Senate whose district includes even a small portion of that county. Thus the county delegation can and often does include state legislators most of whose districts lie outside the county in question; those legislators may wield the decisive votes when there is a disagreement among the legislators whose districts lie wholly within the county in question, or when unanimity is required. Whenever a district crosses county lines, it places the legislator involved on the legislative delegations for multiple counties. County residents understandably may object to additional line-crossing districts, because those districts can reduce the amount of control which county voters have over the legislative delegation that largely determines what county-specific measures will be enacted by the

Legislature.[75] *See* J.S.App. 367-75 (dissenting opinion).

The framers of the 2012 plan repeatedly acknowledged that achieving the district-specific minimum racial ratios required them to fashion districts that crossed county lines. Senator Dial explained that "we adopted the guidelines to keep counties intact as much as possible, but when you apply the Voting Rights Act on top of all that, it makes it almost impossible to keep all counties [intact]."[76] Thus when "[Senator] Singleton[ ] ... had to have more minorities ... he grew into Lamar [County]."[77] Hinaman agreed that "there would be county splits potentially based on the Voting Rights Act and not retrogressing a Majority/Minority district."[78] For example, "House District 69 was ... an African-American Majority district ... [and] was short population and I needed to bring it into Montgomery County."[79] Satisfying the district-specific minimum

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[75] Smitherman testimony, tr. v. 2, at 13 ("we're at the mercy of the suburbs and the surrounding other counties"). At one public hearing, Representative McClendon, speaking as a representative of his home county, not as a co-chair of the Reapportionment Committee, said that placing in his county delegation many legislators who reside in other counties "affects accountability [and] is not right." J.S.App. 374-75 (quoting Doc. 30-26, at 7).

[76] Tr., v. 1, at 91.

[77] *Id.* at 48.

[78] Hinaman dep., APX 75, Doc. 134-4, at 34.

[79] *Id.* at 94.

racial ratio repeatedly led to crossing county lines when the required additional black population was in another county. Even within a county, the awkward manner in which that ratio was satisfied could force another district to straddle a county boundary. The elimination of HD 53 in Jefferson County triggered a series of changes which resulted in two additional districts (both majority white) located partly in that county and partly in suburban counties.[80] There was repeated testimony that complying with the ratio in one county had led to dividing counties among other districts several counties away.[81] The 1% deviation rule rendered the entire districting scheme more rigid, so that the gerrymandering of one district would affect any number of others "like dominos."[82]

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[80] *Compare* SDX 412 (2001) (HD 34, 43, 45, 48) *with* SDX 404 (2012) (HD 14, 15, 16, 43, 45, 48). Under the 2001 House plan there were 13 Jefferson county districts that were located wholly within the county. If that number had remained the same under the 2012 plan, there would have been 66,460 leftover individuals who had to be divided among districts that extended outside of the county. The elimination of HD 53 meant that there were 111,981 such persons.

[81] Tr. v. 1 at 48-49, 114; Dial affidavit, APX 66, at ¶¶ 84, 87; Dial dep., APX 66, Doc. 125-3 at 51-52; Hinaman dep., APX 75 at 53-55.

[82] Hinaman testimony, tr. v. 3, at 69, 123-24; *see* J.S.App. 62, 97-98 ("domino effect"); tr. v. 1, at 108 ("it's all like dominos, and . . . one thing affects the other."); Hinaman dep., APX 75, Doc. 134-4 at 53-54.

The district court majority simply did not discuss the undisputed testimony that satisfying the district-specific minimum racial ratio had indeed led to splitting counties among multiple districts. That subordination to racial considerations of the state constitutional principal of respecting county lines is precisely what is important under *Shaw*.

(5) The Legislature's Guidelines provided that precinct boundaries should be respected because precincts constituted "a community of interest" that should be respected, reflecting a policy embedded in Alabama tradition.[83] The district court found that "[w]hen necessary to avoid retrogression, Hinaman split precincts at the census block level." J.S.App. 104. Hinaman was quite explicit about his practice of dividing precincts along racial lines in order to comply with the district-specific minimum racial ratio.

> Q. And if [a] precinct did not increase the black percentage, or at least it didn't increase it as much as you wanted, you would simply split the precincts and go down to the block level and look for a majority black block or several blocks.
>
> A. Well, that's a little bit of a simplification. I mean, I tried to look at the addi[ ]tions en masse, not just a precinct. I might add a ... majority white precinct and a majority African American precinct; but if you look at the

[83] Doc. 30-4, at 3-4.

> end number, it did not retrogress the overall end number for that precinct, then they were added in. If for some reason they retrogressed that number, then, yes. So I would split precincts.
>
> Q. And when you split precincts, you would have to go to the block level?
>
> A. Yes, sir.
>
> Q. And could you see – you could see on the screen, couldn't you, which blocks on your screen had black populations of substantial numbers, right?
>
> A. Certainly.[84]

The record contains substantial evidence documenting specific instances in which particular precincts were divided on the basis of race, with the black portions going to a majority-black district while the white areas were made part of an adjacent majority-white district.[85] The only information that Hinaman had below the precinct level was the racial composition of individual census blocks. J.S.App. 203-05.

The majority below reasoned that "even where it occurred, precinct splitting was less of an evil to be avoided in redistricting than the subordination of other redistricting criteria, such as compliance with

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[84] Tr. v. 3, at 143; *see* APX 75, Hinaman dep., at 117-18.

[85] Hinaman, tr. v. 3 at 142-44, 178-79, 185-86; Hinaman dep., at 111-14, 117-18.

... the Voting Rights Act." J.S.App. 159. That statement acknowledges that precincts *were* being divided along racial lines to satisfy what the drafters mistakenly insisted was a requirement of the Voting Rights Act.

The majority also suggested that the acknowledged race-based precinct splitting was not legally significant because other precincts, perhaps more of them, might have been split to satisfy the 1% deviation rule.[86] "Our dissenting colleague does not cite ... evidence for support of his assertion that majority-black districts suffered the brunt of the precinct splits...." *Id.* "Taken as a whole, Hinaman's testimony confirms that race was not the predominant motivating factor in precinct splitting." J.S.App. 159. Whether *most* precinct splitting occurred for non-racial reasons might be relevant in a case where a plaintiff claimed that a pervasive pattern of precinct splitting along racial lines constituted circumstantial evidence that a district had been constructed with a racial purpose. Here, however, the drafters' racial purpose was undisputed; the evidence of race-based precinct splitting was significant only as confirmation that the drafters had indeed subordinated the integrity of precincts to achieving the district-specific minimum racial ratio, as their avowed purpose indicated they would. The issue here is whether achieving that racial ratio was the predominant motive in

[86] *But see* J.S.App. 156 (House plan split 57% of majority-black precincts but only 39% of majority-white precincts).

constructing the majority-black districts, not whether – as the court below seemed to believe – race rather than the 1% deviation rule was most frequently the reason that precincts were divided.

(6) The 2012 plan managed to add to SD 26 a total of 14,806 blacks but only 36 whites. The racial machinations needed to achieve that were particularly complex.

Under the 2001 plan after the 2010 census, SD 26 was underpopulated by 11.64%, 15,898 people.[87] The population of SD 26 was 72.75% black. J.S.App. 48. SD 26 occupied most of Montgomery County, including the entire southern half of the county.[88] Immediately to the south of SD 26 was Crenshaw County, with a population of 13,906.[89] Because of unrelated changes in the districting scheme, Crenshaw County was no longer part of any Senate district.[90] So the obvious solution to both problems was to add Crenshaw County to the adjoining SD 26, a step that would have largely solved the underpopulation problem in SD 26. But Crenshaw was only 23.39% black; adding it to SD 26 would have reduced SD 26 from 72.75% to 67.15% black.[91] Hinaman explained that he was unwilling to add

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[87] SDX 402.

[88] J.A. 192; APX 37.

[89] NPX 328, at 1.

[90] *See* tr. v. 3, at 123, 125.

[91] The resulting district would have had a population of 134,572, of whom 91,039 would have been black.

Crenshaw County to SD 26, because doing so would reduce the black percentage of the population in that district. At trial Hinaman acknowledged that if *all* the population added to SD 26 had been white, it still would have been overwhelmingly black; but that simply was not good enough.[92]

So the drafters rejected adding Crenshaw County to SD 26, and looked for another solution. They decided to add Crenshaw County to SD 25, a 71% white district. But SD 25 was located in the northern part of Montgomery County, and parts of another county even further to the north. SD 25 did not adjoin Crenshaw County, and the portion of SD 25 nearest to Crenshaw County was over 20 miles away, with SD 26 in between. So to connect Crenshaw County to SD 25, the framers created what Hinaman described as a "land bridge" – through part of the old SD 26 – between SD 25 and Crenshaw County. *See* J.S.App. 172. By adding 13,906 mostly white people from Crenshaw County to SD 25, it was then possible to transfer an equal number of people from predominantly black portions of SD 25 in Montgomery County to SD 26. Indeed, the drafters *had to* cancel out the addition of the Crenshaw County population to SD 25, because SD 25 was already slightly overpopulated.[93]

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[92] Tr. v. 3, at 179.

[93] Under the 2012 plan 13,906 persons were added to SD 25 from Crenshaw County, and a net total of 15,785 persons were added to SD 26 from SD 25. That meant that SD 25 lost a net of 1,879 persons from the population it had prior to the addition of

(Continued on following page)

Attaching Crenshaw County to SD 25 could not result in a net increase in the SD 25 population without violating one person, one vote; demographically, the land bridge had to be a land bridge to nowhere.

But doing that alone could not have repopulated SD 26 with a virtually all-black group. There assuredly was not a portion of SD 25 that contained 14,806 blacks but only 36 whites. The only way to achieve that exceptional result was to swap predominantly white areas in SD 26 for predominantly black areas of SD 25; the *net* effect of such an exchange could be to add only blacks to SD 26. In terms of traditional districting principles that made no sense; one does not repopulate an underpopulated district by removing people. But that is precisely what Hinaman did. He transferred from *under*populated SD 26 to *over*populated SD 25 the southwest quarter of Montgomery County, an area in the northwest corner of the county, and a portion of the center of the county.[94] The incumbent Senator in SD 26 explained that the new boundary between SD 25 and SD 26 was drawn

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Crenshaw and transfer of population to SD 26. After all of this, SD 25 had a population of 135,492; so before these changes, the SD 25 population (partly in Montgomery County and partly in Elmore County) was 137,361. The ideal Senate district size under the 2010 census was 136,563.

[94] *Compare* APX 37 *with* APX 39; *compare* J.A. 191 *with* J.A. 192.

along racial lines;[95] Hinaman offered no non-racial explanation for removing these areas from underpopulated SD 26. By then replacing predominantly white portions of SD 26 with predominantly black areas from SD 25, the black population in SD 26 was increased from 72.75% to 75.22%, to a level higher than any other Senate district. The resulting SD 26 is a strangely shaped configuration that resembles a downward-facing sand fiddler crab.[96]

The district court acknowledged "race was a factor in the drawing of District 26," noting that Hinaman was seeking "to maintain roughly the same black percentage of the total population [in SD 26]" (J.S.App. 152), and that the Legislature "preserved ... the percentage of the population that was black." J.S.App. 172. The court describes Hinaman as having transferred a portion of Montgomery County "from District 26 to create a land bridge between the former

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[95] J.S.App. 202:

> [Senator] Ross stated that, despite the underpopulation of his district, the new plan actually split precincts that were already part of SD 26, moving white portions of those precincts out of his district while retaining only the black portions; in other words, despite needing a huge number of new residents [in SD 26], Hinaman *removed* white residents already living in SD 26. . . . By taking these various steps to remove white residents and add black ones, the drafters achieved and even exceeded their quota of 72.75% black for the district.

(Emphasis in original).

[96] APX 39; J.A. 197.

area of District 25 and Crenshaw County" (J.S.App. 172), without mentioning Hinaman's acknowledgment that he had connected Crenshaw County to SD 25 rather than to SD 26 in order to avoid reducing the black population percentage in SD 26. The court argued that the dismemberment of SD 26 at least "preserved the core of the existing District" (J.S.App. 172); but it never attempted to explain why (other than for the land bridge) the framers would have removed any areas at all from the underpopulated SD 26. The court explained that Hinaman had added to SD 26 "populous precincts in the City of Montgomery which shared many characteristics with other areas of District 26." J.S.App. 172. But Hinaman never referred to any "characteristics" shared by SD 26 and the portions of SD 25 that were added to it; Hinaman was just "going by the numbers," and the only number that mattered to him about the areas added to SD 26 was the number of black people who lived there. The court notes that the areas transferred from SD 25 to SD 26 "included both black and white persons" (J.S.App. 172); but Hinaman was perfectly clear that he selected those areas precisely because – unlike Crenshaw County – they included far more blacks than whites.

(7) There are no material factual disputes about the manner in which the state achieved the district-specific minimum racial ratios in this case. When achieving those ratios conflicted with the Legislature-endorsed tradition that incumbents should not be placed in the same district, that tradition was

disregarded. When implementing the ratios was inconsistent with the principle that existing districts should be preserved, the districts were cannibalized. When the ratios could not be created without disregarding the whole-county provisions of the state Constitution and the legislative Guideline against splitting counties and precincts, the counties and precincts were divided. When the ratios required that people actually be taken *out* of underpopulated districts, they were removed. The district court's assertion that none of this pattern of activity should be characterized as "subordinating" traditional districting principles to the drafters' professed racial purpose reflects, not any factual disagreement, but merely an insistence by that court in using the term "subordination" in a highly idiosyncratic manner inconsistent with the legal standard in *Shaw* and its progeny.

II. THE RACE-BASED DISTRICTING WAS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST

Because race was the predominant motivating factor in the redrawing of the majority-black districts, the state must establish that the redistricting plan satisfied strict scrutiny. To do so, Alabama must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest. The state contends that the manner in which those districts were fashioned was required by section 5 of the Voting Rights Act. We agree that Alabama may seek to justify its 2012 plan as necessary to comply with

section 5, despite this Court's intervening decision in *Shelby County, Ala. v. Holder,* 133 S.Ct. 2612 (2013). But section 5 neither required nor sanctioned the unusual race-based scheme used to create that plan.

"A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I,* 509 U.S. at 655. A mistaken belief as to the meaning of section 5 does not constitute a compelling interest. *Miller v. Johnson*, 515 U.S. at 922-23. Alabama's actions must have been "required by a correct reading of § 5." *Shaw II,* 517 U.S. at 911. The district court concluded that section 5 establishes a per se rule, requiring a covered jurisdiction whenever possible to maintain the level of the minority population percentage in every majority-minority district, regardless of how high that percentage might be and without consideration of any other relevant circumstances. J.S.App. 180-81. That interpretation "was woefully incorrect." J.S.App. 247 (dissenting opinion).

Section 5(b) provides that a covered jurisdiction may not enforce a voting standard that "will have the effect of diminishing the ability of any citizens of the United States on account of race ... to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). That language cannot fairly be read to require a covered jurisdiction to permanently maintain the minority population percentage in every district. Some population percentages would be so high that a reduction would not realistically diminish the ability of

the protected group to elect the candidates of its choice. If a districting plan reduced some group from 100% of a district to 90%, it would be very odd to say that the legislation had diminished the ability of that group to elect candidates of its choice. At some population level – the figure would of course vary with any number of circumstances – the ability of a protected group to elect the candidates of its choice would be so obvious that changes (up or down) above that level would be of no practical importance.

The statutory language requires an evaluation of the effect of a redistricting plan on the ability of citizens to elect not just one candidate, but the candidates – plural – of their choice. The redistricting steps taken to maintain the minority population percentage in one district might require reduction of the percentage of that population in another district; section 5 obviously cannot mean that the minority population must be unchanged in *both* districts.[97]

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[97] Senator Dial insisted that section 5, as he interpreted it, had forced the state to eliminate most of the districts that were 30-50% black, in order to maintain the racial ratios in the majority-black districts. Tr. v. 1, at 61.

> Q. So what you're saying Senator, is that in pursuing your overriding goal of maintaining the large black majorities in the majority black districts, if that resulted in blacks being taken out of the majority white districts, diluting their influence in those majority white districts, that was just collateral damage? That was just an accident or the result you get because of pursuing the Voting Rights Act?
>
> A. That was because of the Voting Rights Act.

(Continued on following page)

Cannibalizing districts reduces the number of candidates of choice which a group can elect; the plan in this case preserved the black population percentage in eight Jefferson County districts by eliminating entirely the ability of blacks in that county to elect a ninth Representative of their choice. In that sense the plan diminished, rather than protected, the ability of blacks to elect the candidates of their choice.

Interpreting section 5 to bar in *all* circumstances any reduction in the black population percentage of a district would have peculiar consequences.

> On the majority's view, if a district is 99% black, the legislature is prohibited by federal law from reducing the black population to a mere 98%. Read in this way, § 5 would become a one-way ratchet: the black population of a district could go up, either through demographic shifts or redistricting plans (like this one) that raise the percentage of black people in some majority-black districts. But the legislature could never lower the black percentage, at least so long as it was "feasible" to avoid it.

J.S.App. 263 (dissenting opinion).

Section 5(b) was adopted in part to overturn this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461

Q. So we can blame the Voting Rights Act for the loss of black influence in the majority white districts?

A. Absolutely.

(2003), that section 5 permits a jurisdiction to replace a district in which minority voters can elect the candidates of their choice with districts in which they would have instead the ability to "influence" the political process. 539 U.S. at 482. Congress sought to codify the different interpretation of section 5 in Justice Souter's dissenting opinion. Justice Souter noted that every member of the Court agreed that section 5 did not invariably require a covered jurisdiction to freeze the level of the minority population in a district. "The District Court began with the acknowledgment (to which we would all assent) that the simple fact of a decrease in black voting age population ... in some districts is not alone dispositive about whether a proposed plan is retrogressive." *Georgia v. Ashcroft,* 539 U.S. at 498 (Souter, J., dissenting); *see id.* at 504-05 (Souter, J., dissenting) ("nonretrogression does not necessarily require maintenance of existing supermajority minority districts"). Senator Leahy, the original and lead sponsor of the legislation, expressly endorsed that interpretation of section 5, noting that it was consistent with earlier precedent.[98] Although, as the district court noted, the

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[98] 152 Cong. Rec. S 7949-05 (2006) ("The amendment to Section 5 does not . . . freeze into place the current minority voter percentages in any given district. As stated by the dissenters in *Georgia v. Ashcroft,* as well as by Professor Arrington and Professor Persily at the Committee hearings, reducing the number of minorities in a district is perfectly consistent with the pre-*Ashcroft* understanding of Section 5 as long as other factors demonstrate that minorities retain their ability to elect their preferred candidates.").

2006 legislation that added section 5(b) was intended in certain respects to establish a more stringent section 5 standard, that difference is not relevant here. Congress intended only to restore, not to alter, the pre-*Georgia v. Ashcroft* rule that forbad retrogression in the ability of a protected minority to elect candidates of its choice.

The Department of Justice, which administers section 5, has consistently[99] maintained – and advised covered jurisdictions – that whether a districting plan is retrogressive does not turn solely on the population of the district. "In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment.... [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act,* 76 Fed.Reg. 7470, 7471 (Feb. 9, 2011). The Department considers among other things "whether minorities are overconcentrated in one or more districts," a factor which necessarily recognizes that a minority population percentage above some level would have the effect of reducing overall minority voting strength. *Id.* at 7472; *see* 52 Fed.Reg. 486 (Jan. 6, 1987); 28 C.F.R. § 51.59(d).

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[99] The Department interpreted section 5 in the same manner in 2001. 66 Fed.Reg. 5412, 5413 (Jan. 18, 2001).

The Department has specifically pointed to actual election results as important to understanding whether a redistricting plan would reduce the ability of members of a protected group to elect the candidates of their choice. "[T]his determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." 76 Fed.Reg. at 7471. In determining the population level at which minorities have the ability to elect candidates of their choice, a page of election history may be worth a volume of predictions. "[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Johnson v. De Grandy,* 512 U.S. 997, 1020 (2000). Of course the assessment of election data, as any other information, may require complex judgments; the election of a single candidate supported by the minority community may prove little.

The court below suggested that "the best evidence available" as to what should be done to comply with section 5 was to be found in the actions of the Democratic controlled 2001 Legislature, which the district court insisted had deliberately "maintained"[100] the black population percentages in each of the majority-black districts, "by adding similar percentages of black voters to those districts." J.S.App. 184. As we explained above, however, the Legislature in

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[100] J.S.App. 4, 6-7, 20, 22, 147, 151, 161-62.

2001 actually did the opposite, reducing the black population percentages in almost all those House and Senate districts. (*See* p. 3, *supra*; Brief Appendix, pp. 8a-10a). Even if that were not the case, the redistricting plan of a particular state throws no light on the meaning of the statute.

This emphatically is not a case in which a state made a deliberate and informed assessment of the population level at which minority voters in a particular district would be able to elect the candidates of their choice. Hinaman consistently stressed that he never considered anything – past election results, voter participation rates, or other studies – except the black population percentage under the 2001 lines after the 2010 census.[101]

What this Court said in *Bartlett v. Strickland*, 556 U.S. 1 (2008), about section 2 of the Voting Rights Act is equally applicable to section 5. "It would be an irony ... if [the provision] were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'" 556 U.S. at 25 (quoting *De Grandy*, 512 U.S. at 1020) (plurality opinion). As Judge Thompson eloquently emphasized in his dissenting opinion, "[t]he purpose of the [Voting Rights Act] is to help minority groups achieve equality, not to lock them into legislative ghettos." J.S.App. 262.

[101] Tr. v. 3, at 148-9; Hinaman dep., APX 75, Doc. 134-4, at 139, 147.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

JAMES U. BLACKSHER
P.O. Box 636
Birmingham, AL 35201
(205) 591-7238
jblacksher@ns.sympatico.ca

EDWARD STILL
130 Wildwood Parkway
Suite 108 PMB 304
Birmingham, AL 35209
(205) 320-2882

U.W. CLEMON
WHITE ARNOLD & DOWD P.C.
2021 Third Avenue North
Suite 500
Birmingham, AL 35203
(205) 323-1888

Counsel for Appellants

**Counsel of Record*

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C., provides:

> (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting,

or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days

after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or

abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

2001 and 2012 Plans Under 2010 Census Majority-Black House Districts			
District	**2001 Plan**	**2010 Plan**	**Difference**
19	69.82%	61.25%	-8.57%
32	59.34%	60.05%	+.71%
52	60.11%	60.13%	+.02%
53	55.71%	55.83%	+.12%
54	56.73%	56.83%	+.10%
55	73.55%	73.55%	0
56	62.13%	62.14%	+.01%
57	68.42%	68.47%	+.05%
58	77.86%	72.76%	-5.10%
59	67.03%	76.72%	+9.69%
60	67.41%	67.88%	+.47%
67	69.14%	69.15%	+.01%
68	62.55%	64.56%	+2.01%
69	64.16%	64.21%	+.05%
70	61.83%	62.03%	+.20%
71	64.28%	66.9%	+2.6%
72	60.12%	64.5%	+4.4%
76	69.54%	73.79%	+4.25%
77	73.52%	67.04%	-6.48%
78	74.26%	69.99%	-4.27%
82	57.13%	62.14%	+5.01%
83	56.92%	57.52%	+.60%
84	50.61%	52.34%	+1.73%

97	60.66%	60.66%	0
98	65.22%	60.02%	-5.20%
99	73.35%	65.61%	-7.74%
103	69.84%	65.06%	-4.78%

Source: Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 13-14; SDX 403 at p.5 col. 7; APX 6

2001 and 2012 Plan Under 2010 Census Majority-Black Senate Districts			
District	**2001 Plan**	**2012 Plan**	**Difference**
18	59.92%	59.10%	-.82%
19	71.59%	65.31%	-6.28%
20	77.82%	63.15%	-14.67%
23	64.76%	64.84%	+.08%
24	62.78%	63.22%	+.44%
26	72.69%	75.13%	+2.44%
28	50.98%	59.83%	+8.85%
33	64.85%	71.64%	+6.79%

Source: Defendants' Proposed Findings of Fact and Conclusions of Law, Doc. 196, at 12.

1993 and 2001 Plans Under 2000 Census Majority-Black House Districts			
District	**1993 Plan**	**2001 Plan**	**Difference**
19	78.565%	66.039%	-12.526%
32	63.490%	59.598%	-3.892%
52	73.870%	65.848%	-8.022%
53	65.298%	64.445%	-.853%
54	63.061%	63.276%	+.215%
55	76.270%	67.772%	-8.498%
56	70.268%	62.665%	-7.603%
57	82.615%	62.967%	-19.648%
58	74.163%	63.518%	-10.645%
59	66.255%	63.241%	-3.014%
60	74.876%	64.348%	-10.528%
67	71.032%	63.447%	-7.585%
68	62.938%	62.211%	-.727%
69	64.855%	65.308%	+.453%
70	75.603%	62.827%	-12.776%
71	67.736%	64.191%	-3.545%
72	64.652%	60.748%	3.904%
76	76.527%	73.309%	-3.218%
77	74.802%	69.677%	-5.125%
78	68.874%	72.697%	+3.823%
82	78.826%	62.663%	-16.163%

83	60.782%	61.214%	+.432%
85	53.312%	47.863%	-5.449%
97	67.243%	64.738%	-2.505%
98	69.401%	64.448%	-4.953%
99	74.916%	65.250%	-9.666%
103	75.299%	63.049%	-12.250%

Source: J.S.App. 47, col. 4 and SDX 419

1993 and 2001 Plans Under 2000 Census Majority-Black Senate Districts			
District	**1993 Plan**	**2001 Plan**	**Difference**
18	67.588%	66.685%	-.903%
19	76.452%	66.227%	-10.225%
20	71.829%	65.697%	-6.132%
23	66.081%	62.305%	-3.776%
24	68.964%	62.409%	-6.555%
26	73.485%	71.507%	-1.978%
28	59.269%	56.458%	-2.811%
33	70.483%	62.451%	-8.032%

Source: J.S.App. 48 col. 4 and SDX 416